IN THE

SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1976

No. 75-1831

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AUBREY LEE ROBINSON,
DAWNA WINKLES ROBINSON,
WILLIE ALDORA WINKLES,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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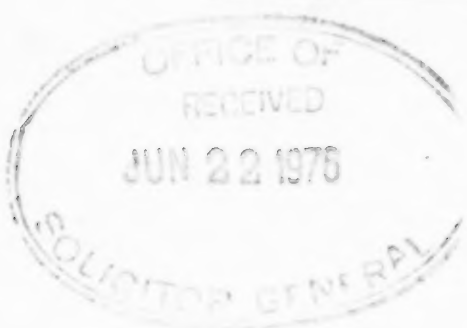


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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners AUBREY LEE ROBINSON, DAWNA WINKLES ROBINSON and WILLIE ALDORA WINKLES respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 21, 1976.

## OPINIONS BELOW

The Fifth Circuit Court of Appeals rendered its opinion on May 21, 1976 by and

its overruling of Petitioners' Motion for Rehearing, said judgment being filed on the same date. Said opinion may be found in Appendix A annexed hereto. In overruling said Petitioners' Motion for Rehearing, no authority was cited by the Fifth Circuit; however, in its original denial of relief dated April 27, 1976, the Fifth Circuit affirmed per curiam, citing N. L. R. B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d 966. (See Appendix B). A Memorandum Opinion, written by the United States District Judge, the Honorable Owen D. Cox, after the trial in this case is also attached hereto as Appendix C.

JURISDICTION

On April 27, 1976, the Fifth Circuit Court of Appeals entered judgment affirming the criminal convictions of the respective Petitioners for possession with intent to distribute approximately 154 pounds of marihuana in violation of 21 United States Code, Section 841 (a) (1). (Appendix B).



The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit Court of Appeals correctly decided that the rights of the respective Petitioners under the Sixth Amendment of the United States Constitution had not been violated by rendering its per curiam affirmance. Restated, whether the failure of the Trial Judge to sustain Petitioner's Motion to Disclose the Identity of the informant was in violation of the Sixth Amendment right of the respective Defendants to be confronted with the witnesses against him, where the information provided by the informant was hearsay upon hearsay, and where the probable cause for the search in question was based solely upon said hearsay information and was not corroborated by the arresting officers.

2. Did the Fifth Circuit Court of Appeals err in its affirmance of Petitioner's

respective convictions where the Record clearly shows that the failure to sustain Petitioners' Motion to Suppress the subject evidence in question was in violation of Petitioners' Fourth Amendment rights, protecting them against unreasonable searches and seizures? Restated, did the Fifth Circuit Court of Appeals commit error where the search and seizure in question was made without a warrant and was predicated solely upon the hearsay information of a so-called reliable informant, where it is admitted and the Record clearly shows that said informant did not have personal knowledge about the information he gave?

3. Did the Fifth Circuit Court of Appeals err by and through their per curiam affirmance of the Trial Court's adjudication of guilt as to the passengers in the automobile in question, to-wit: DAWNA WINKLES ROBINSON and AUBREY LEE ROBINSON, where the Record is devoid of evidence to exclude the hypothesis that the driver was the sole



possessor of the contraband in question?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Sixth Amendment to the United States Constitution is pertinent hereto which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Emphasis supplied).

The Fourth Amendment to the Constitution of the United States is likewise pertinent to this case and reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As aforesaid, 21 U S C, Section 841 (a) (1) is also pertinent hereto and reads as follows:

"Except as authorized by this sub-chapter, it shall be unlawful for any person to knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

STATEMENT OF THE CASE

The facts of this case, as testified to by witnesses for the Government, reveal that the investigation of the case began about three o'clock in the afternoon on September 11, 1974 when one of the agents received a phone call from an informant. The informant



told this agent that there was a man by the name of Aubrey Robinson and three other persons at the Palm View Motel in McAllen, Texas in Rooms 209 and 210. This informant further stated that the people in the motel were there for the purpose of transporting a quantity of marihuana to the state of Alabama. A car description was given, as well as the license plate. Government agents set up surveillance and one of the agents was subsequently notified that four persons had left the motel in the subject automobile and were proceeding in an easterly direction near Expressway 83, McAllen, Texas. The initial surveillance was subsequently lost; however, at approximately six o'clock p.m., this same government agent was again contacted via radio and informed that the subject automobile was proceeding north on Highway 281 towards San Antonio, Texas. This agent was further informed that the surveilling officer could see only three occupants in the automobile. The subject

automobile continued north on Highway 281 and passed through the Border Patrol Checkpoint located approximately 10 miles south of Falfurrias, Texas unmolested due to the fact that the checkpoint was not operating at that time. Assistance from other government agents was subsequently requested and the vehicle was followed to a point near Highway 77 and I-37 Intersection near Robstown, Texas, at which time the vehicle was stopped. At trial, one of the government agents testified that the reason the vehicle was stopped was because he discovered that there were four occupants in the auomobile. Apparently, this factor constituted the sole corroboration of the hearsay information which had been received by the government's informant.

A search was conducted; the back seat of the vehicle was removed revealing marihuana in the vehicle. The Record indicates that the entire initial conversation between the government agents and the Petitioners took place within 30 seconds during which time



the search was initiated. Petitioners were then placed under arrest and subsequently indicted for violation of 21 U S C, Section 841 (a) (1) (supra).

At trial on the merits, in United States District Court, it became apparent that the subject informant was not relying on any information which he knew of his own personal knowledge but, to the contrary, was relying on hearsay information that he had been told by an unknown third party. At the outset of cross-examination, the following colliquy takes place:

> "Q Okay, and going back to the exact information that was relayed to you by this reliable informant, Mr. Murray, could you tell me how your informant received your information?
>
> A My informant <u>was</u> <u>told</u> that there was a narcotics transaction occurring and who was participating in it." (emphasis supplied)

Further cross-examination amplified the fact that the informant's information was

totally based on hearsay:

"A The information that the informant passed to me, he had received from another party.

Q From another party, period?

A Yes."

The Record further reveals that the Petitioner, WILLIE ALDORA WINKLES, was the driver of the auomobile and that the Petitioners, DAWNA WINKLES ROBINSON and AUBREY LEE ROBINSON, were passengers in said automobile.

Petitioners were nevertheless convicted for violation of 21 U S C, Section 841 (a) (1) (supra).

REASONS FOR GRANTING THE WRIT

Petitioners and the undersigned counsel recognize that a petition for writ of certiorari is a matter of sound discretion of this Honorable Court and that they will not be afforded any further relief as a matter of right. Petitioners respectfully assert that the Honorable Fifth Circuit Court of Appeals has misapplied the



substantive law in the instant case, denying Petitioners both their constitutional rights to have confrontation in a criminal proceeding and, further, to be free of unreasonable searches and seizures.

The predicate upon which the Government relied to admit the foregoing hearsay testimony of the informant does not meet the two-pronged test of either Aguilar v. State of Texas, 84 S Ct 1509 (1964), 378 U S 108, or Spinelli v. United States, 89 S Ct 584 (1969), 393 U S 410. Petitioners respectfully assert that the instant case should be governed by the case of Whitely v. Warden, 401 U S 560, 9 S Ct 1031 (1971). In Whitely, a sheriff received a tip upon which he swore out a complaint. Subsequently, a police radio bulletin alerted area officers to be on the lookout for the individuals described. Another sheriff arrested Whitely on the basis of the radio bulletin. This Court stated that the underlying information must be examined in order to determine if probable

cause existed. The following quotation is germane:

> "But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or as in Draper were in the process of committing the felony."
>
> (emphasis supplied).

The following language from Whitely clearly provides the mandate for the instant case:

> "In the present case, the very most the additional information tended to show is that either Sheriff Ogburn, or his informant, or both of them knew Daley and Whitely and the kind of car they drove; the record is devoid of any information at any stage of the proceeding from the time of the burglary to the event of the arrest and search that would support either the reliability of the informant or the informant's conclusion



> that these men were connected with the crime."

The above quotation is directly analogous to the instant case and the facts herein are even more graphic, in that the Record conclusively establishes that the informant who made the telephone call to the government agents had no personal knowledge whatsoever of any of the information that he supplied to the agent. Furthermore, the only information that the Drug Enforcement agents had, which was hearsay on hearsay, was to the effect that a described automobile with four occupants would be leaving the Rio Grande Valley. There is no evidence whatsoever to show or even suggest the actual informant's reliability.

In United States v. Impson, 482 F 2d 197 (5th Circ., 1973), the Fifth Circuit specifically held:

> "But if that (the information received) is the sole cause for the detention and resulting search - as it apparently was

here - then the Government has the burden of showing that the information on which the action was based itself had a reasonable foundation." (emphasis supplied by the Court)

Petitioners respectfully assert that this incumbent burden upon the Government was totally lacking in the case predicating this petition for writ of certiorari. The Trial Court's Memorandum and Order (Appendix C) found that there was "probable cause" to conduct the search in question. This finding was predicated solely on the information furnished by the alleged "reliable informant". Specifically, the Trial Court held:

> "This conclusion is based upon the Court's determination that the information (furnished by the informant) which Murray had was sufficient to warrant the surveillance, and such information gave the DEA agents the probable cause needed." (emphasis supplied)



Petitioners submit that in fact there is no evidence in the Record to establish "probable cause", save that of the information provided by the alleged "reliable informant". Petitioners accordingly submit that the Fifth Circuit Court of Appeals erred by their affirmance of the Trial Court's failure to require the disclosure of the identity of the informant, requested by motion of Petitioners. Petitioners were thereby denied their right of confrontation as guaranteed by the Sixth Amendment of the United States Constitution. It is a well-established principle of law that the Government is required to disclose the identity of the informant when there is a lack of independent evidence to otherwise establish probable cause. Roviaro v. United States, 353 U. S. 53, 77 S Ct 623; Scher v. United States, 305 U. S. 251, 59 S Ct 174.

The Trial Court has placed heavy reliance on Draper v. United States, 358 U. S. 307 (1959). Petitioners respectfully assert that there is no correlation between Draper and

the instant case because of the tremendous discrepancies between the amount substantive corroboration in the Draper case and the relative total lack of corroboration in the instant case. The only corroboration afforded government agents in the instant case was to the effect that a certain automobile was travelling north on Highway 281 and that it had four occupants in it. This scintilla of corroboration does not meet the test of Aguilar, Spinelli, Impson and Whitely (supra). The Government therefore had the burden of showing that the information it acted on was reasonably founded. The Draper case involved the following substantiated corroboration: (a) a complete description of the subject defendant; (b) a complete description of the clothes he was wearing; (c) the precise train he would alight from; (d) the fact that he would be carrying a briefcase; and, (e) that he would be "walking fast". Petitioners submit that there is no indication that a felony has been committed



simply by the fact that four occupants in an automobile are proceeding north on a given highway, especially in light of the fact that the so-called "reliable informant" has no personal knowledge whatsoever of the information he conveys to the Government.

Finally, with regard to Petitioners' Third Question Presented, Petitioners assert that the Honorable Fifth Circuit Court of Appeals misapplied the substantive law and mandate of United States v. Cantu (5th Circ., 1974) 504 F. 2d 387. After a checkpoint search and subsequent conviction, the convictions of the two passengers in the subject automobile were reversed because there was no evidence to exclude the hypothesis that the driver was the sole possessor of the contraband. Petitioners DAWNA WINKLES ROBINSON and AUBREY LEE ROBINSON respectfully submit there is likewise no evidence in the instant case to exclude the hypothesis that the driver, Petitioner WILLIE ALDORA WINKLES, was the sole possessor of the contraband.

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted in order to resolve the important Sixth and Fourth Amendment questions raised by this case and in order to protect the respective constitutional rights of Petitioners which were violated by the Government prior to Petitioners' respective indictment.

Respectfully submitted,

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512/686-1119

Attorney for the
Petitioners

Dated June 17, 1976.



IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT



No. 75-3221

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

AUBREY LEE ROBINSON,
WILLIE ALDORA WINKLES, and
DAWNA WINKLES ROBINSON,
Defendants-Appellant

- - - - -

Appeals from the United States District Court
for the Southern District of Texas

- - - - -

ON PETITION FOR REHEARING

May 21, 1976

Before BROWN, Chief Judge, JONES and GOLDBERG, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

(Appendix A)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 75-3221

DO NOT PUBLISH

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UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

AUBREY LEE ROBINSON,
WILLIE ALDORA WINKLES, and
DAUNA WINKLES ROBINSON,
Defendants-Appellants

---

Appeals from the United States District Court
for the Southern District of Texas
(April 27, 1976)

Before BROWN, Chief Judge, JONES and GOLDBERG, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

---

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d 966.

(Appendix B)



IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CLERK, U.S.DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
F I L E D
JUL 9, 1975
V. BAILEY THOMAS, CLERK
BY DEPUTY: /s/Sue McCall

| | |
|---|---|
| UNITED STATES OF AMERICA | |
| V. | CR. NO. 75-C-29 |
| AUBREY LEE ROBINSON,<br>DAWNA WINKLES ROBINSON,<br>AND WILLIE ALDORA WINKLES | |

MEMORANDUM AND ORDER

These three Defendants, Aubrey Lee Robinson, Dawna Winkles Robinson and Willie Aldora Winkles, were charged by indictment with, on or about September 11, 1974, possessing with intent to distribute approximately 154 pounds of marihuana, in violation of 21 U.S.C., §841 (a)(1).

On the 21st day of April, 1975, at docket call, all three Defendants, all being represented by the same attorneys, appeared before the Court. Each Defendant waived a jury trial by executing a formal written waiver of jury,

(Appendix C - Page 1)

which was consented to by the United States in writing and approved by the Court. The case was thereafter set for non-jury trial on Monday, June 23, 1975.

These Defendants had previously filed a joint motion to suppress and also a joint motion to require the government to disclose the identity of an informer. At the commencement of this trial, the Court announced that it proposed to carry the motion to suppress and also the motion to disclose the identity of an informer along with the case on the merits.

At this point, the Court wishes to point out that the Defendants contend their motion to suppress the 154 pounds of marihuana should be granted because the seizure on the United States Highway 44 near Robstown, Texas, was unlawful, there was no warrant for an arrest, no probable cause for the arrest, and no probable cause for the search of the vehicle and the seizure of the contraband.



Further, the Defendants have based their motion to disclose the identity of an informer on the representation that the testimony of the informer would be vital to the defense of these Defendants, that this evidence which the informant could give would relate to the government's attempt to establish probable cause from the information received from the informer; and further that the informer was an active participant in the transaction.

In view of the importance of these two motions to the final decision in this case, the Court will first make findings of fact and consider them in the light of said motions.

The first witness called by the government was Murray, an agent of the Drug Enforcement Agency who had been working in the Valley for about four years. He had received a call from an informant at approximately 3:00 p.m. on September 11, 1974. Murray testified this informant had previously given reliable information to him in about fifteen cases involving

criminal matters. The informant told Agent Murray that he had been told Aubrey Robinson and three other persons were staying in Rooms 209 and 210 at the Palm View Hotel in McAllen, Texas; that they had a 1972 Plymouth with Alabama license plates, IC 4529, and they had available another vehicle with a license plate KKX 498. The informant further stated that these individuals were going to "import a quantity of marihuana" back to Alabama. This language implies the load to be more than a few cigarettes.

Based on this information, Agent Murray went to the motel and he saw the Alabama car in the parking area near the rooms in which the individuals were reportedly staying. He verified that the hotel rooms 209 and 210 had been signed for by Robinson. The Texas-licensed vehicle was never observed by him on that occasion or on any other occasion.

Agent Murray then returned to the DEA office. He explained the information he had and enlisted surveillance help from John



Powell, another agent. Powell went to the motel parking area. He observed the Plymouth leaving the motel and he saw only three people in it. He lost sight of the vehicle, however, on the interstate highway frontage road, and radioed this information to Murray. Powell then set up surveillance on U.S. Highway 83 near Alamo, Texas. Special Agent Moore overheard the radio conversations between Powell and Murray about the Alabama Plymouth, and he offered to help. He was asked to maintain surveillance just north of Edinburg on U.S. Highway 281 in the event the Alabama Plymouth took that route out of the Valley.

Subsequently, that evening about 6:00 p.m., the DEA office in San Antonio relayed information to Murray from Moore that he had seen the Plymouth and it was heading north from Edinburg. When Moore saw the Plymouth just north of Edinburg, it was on said Highway 281 and there were only three people visible in the car. He followed the Plymouth for about ten miles. Agent Wilkins was also on

surveillance north of Edinburg, but he was traveling behind Moore.

When the agent following the Alabama Plymouth could only see three persons in the car as it proceeded toward Falfurrias, Murray testified they decided not to stop the vehicle but to wait and see if the fourth member of the group would join the other three at some point up the road. So, Moore continued to follow the car north from Edinburg. As the Plymouth approached Falfurrias, it stopped along the side of the highway. Moore stopped his vehicle about one-half to three-quarters of a mile back. He observed the people in the Plymouth through binoculars and noticed the two in the front seat were looking at the person in the back seat and appeared to be talking, and the one in the back seat looked out of the rear window. Then, the Alabama Plymouth took off at a high rate of speed and Moore was unable to follow close behind. He lost sight of the car. He increased his speed to about 110 mph and when he again



sighted the car it was travelling about 50-55 mph. He followed them on to Alice and then over toward Robstown. There were four persons visible in the car as it approached Robstown. The agents followed the vehicle to the intersection of IH 37 and Highway 77, and there stopped the Plymouth. By this time, Agents Dracoulis and Hester had become involved, and the decision to stop the vehicle was made jointly by them and Murray.

Agent Dracoulis approached the parked Alabama Plymouth first and then the other officers moved in. Mrs. Winkles had been driving and Robinson was in the front seat with her; the other two were in the back seat. When the agents reached the Plymouth, all of the occupants got out of the car and Agent Dracoulis asked for the car keys. The driver gave him the ignition key and said the other keys had been stolen. She explained they had left the keys in the car while they were loading and they were taken but they had a spare ignition key in a hide-a-key container.

No such container was found in th[illegible]ar by the officers. One of the agents went into the trunk through the back seat and opened it. He discovered burlap bags and a paper sack filled with the marihuana, along with several pieces of luggage, in the trunk. On this occasion, Mrs. Winkles said obviously the person who had stolen the car keys had left the marihuana in the trunk. This statement was a volunteer statement made by her at a time when the agents were discussing the marihuana among themselves. Soon afterward, the Miranda warnings were read to each of these Defendants. There were several suitcases in the trunk and later on, at the office of the Drug Enforcement Agency, these Defendants identified their own clothing. Defendant Robinson had on his person over $1,000 in cash.

In searching the properties of Dawna Winkles Robinson, and particularly her blue denim purse, they found paper which is commonly used in rolling marihuana cigarettes; in



Willie's purse there was a bottle containing black pills prescribed for Dawna, and there were also marihuana sweepings in Willie's purse, which she claimed to be tea. Also, on the front seat were other pills like those found in Willie's purse.

At the conclusion of the government's case, each Defendant moved the Court for judgment of acquittal based on the failure of the government to establish the validity of the search of the Plymouth and the seizure of the contraband; the validity of the arrest of the Defendants; and also, because of the failure of the government to divulge the name of the informant from whom Agent Murry had gotten the original information about this transaction. The Court, having carried along the Defendants' motions with the trial, did, in effect, deny said motions at the time the judgment of acquittal was denied. The government and the Defendants closed.

The Court, having now reviewed all of the facts in the case, has concluded the

motions were properly denied and the contraband is properly in evidence. This conclusion is based upon the Court's determination that the information which Murray had was sufficient to warrant the surveillance, and such information gave the DEA agents the probable cause needed. Other activities of Defendants, after they left the Palm View Motel, supported the probable cause. The exigent circumstances required stopping the vehicle, arresting these Defendants, searching the vehicle, and seizing the contraband. Carroll v. United States, 267 U.S. 132, 153-162; Chambers v. Maroney, 399 U.S. 42, 47-51; United States v. McCann, 465 F. 2d 147 (5th Cir. 1972); United States v. Horton, 488 F. 2d 374 (1973).

Further, there was no evidence which indicated the name of the informant should have been divulged. The Defendants obviously wanted to try the informant and his informant and to make an issue of their credibility, but the Court considered such procedure unjustified. The informant's information



proved accurate, as is attested to by the corroboration of various items of information which he supplied and by the seizure of the contraband marihuana. There was no testimony which suggested the informant had any information which might have provided the Defendants with leads to assist with their defense. The informant had bought none of the contraband, had not participated in the negotiations for the purchase of the contraband, had not been actively involved in surveillance of these Defendants. He was not present when the Defendants were arrested. This informant was nothing more than an informer, and no disclosure of his identity is required. United States v. James Thomas Clark, 482 F. 2d 103 (5th Cir. 1973); United States v. Mathew McGruder, et al, No. 74-3903, United States Court of Appeals, Fifth Circuit, June 23, 1975.

The Defendants make much of the hearsay aspects of the information which was given to Agent Murray by the informant. These facts had been told to said informant by someone

else. So, they were not within the informant's actual knowledge. Because of this state of affairs, the Court has reviewed the rules for testing informer information which the Supreme Court of the United States has provided in Aguilar v. Texas, 378 U.S. 108, and Spinelli v. United States, 393 U.S. 410. But the following language of Spinelli, particularly, which says the informant must rely on "something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation" is not at all applicable to our case here. We conclude the particular circumstances before this Court more nearly fit those in Draper v. United States, 358 U.S. 307 (1959), and it should be a starting point for us here. It says hearsay information is not bad, per se, and it can be relied upon in determining probable cause if it comes from an informant who has proved to be reliable.

After considering the accuracy of the information about (1) the Alabama automobile



and its license number, (2) the name of Robinson as one of the persons involved, (3) the Palm View Hotel, and (4) the numbered rooms which had been signed for by Robinson, the reliability of the informant's sourse is certainly apparent. It is obvious that the person who gave such hearsay to the informant was not relying on "casual rumor" or "an individual's general reputation". Further, we point out Alabama people in McAllen, Texas, getting ready to haul contraband, would not likely be the principal characters in a casual rumor or have a general reputation in the area as dealers in contraband.

The Fifth Circuit Court of Appeals, in United States v. Anderson, 500 F. 2d 1311 (5th Cir. 1974), at page 1316, says, in a case with facts very similar to those with which we are hereby concerned:

> "We believe that this corroboration evinced a knowledge of the inner workings of the appellants' system sufficient to dispel any believe

that the tip was based upon 'casual rumor,' 'suspicion', or 'mere conclusion.' See United States v. Sellers, 483 F. 2d 37 (5th Cir. 1973). Since the information supplied by the informant positively indicated that the defendants intended to violate the law in a specific and detailed manner, the fact that the informant did not supply the agent with personal knowledge that a purchase had taken place was of no consequence."

This position is further supported by United States v. Neito, 510 F. 2d 1118 (5th Cir. 1975). It is not within reason to require an informant to be so involved in a transaction as to have first-hand knowledge of most of the facts before his tips can be used. We hold that the federal agents had probable cause to search the Alabama Plymouth. To say otherwise would be to give the dope pushers an edge over law enforcement greater than the Constitution of the United States intends for them to have.



It is, therefore, ORDERED that the motion of the Defendants to suppress the contraband and other physical evidence seized be, and it is hereby, denied.

It is also ORDERED that the motion of the Defendants that the name of informant be divulged be, and it is hereby, denied.

It is further ORDERED that motion of said Defendant for judgment of acquittal, made at the close of the government's case, be, and it is hereby, denied.

All three of these Defendants have been found guilty on all counts, as previously announced in open court, it is ORDERED that sentencing as to each one of these Defendants be, and it is, set for August 1, 1975, at 1:30 o'clock p.m., and these Defendants are ordered to appear at such time.

Copies of this memorandum and order shall be furnished to appropriate counsel.

SIGNED this 9th day of July, 1975.

/s/ Owen D. Cox
United States District Judge

No. 75-1831

# In the Supreme Court of the United States

OCTOBER TERM, 1976

AUBREY LEE ROBINSON, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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RICHARD L. THORNBURGH,
*Assistant Attorney General,*

JOSEPH S. DAVIES, JR.,
ANN T. WALLACE,
*Attorneys,*
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*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 75-1831

AUBREY LEE ROBINSON, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B) and the district court (Pet. App. C) are not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on April 27, 1976, and a petition for rehearing was denied on May 21, 1976 (Pet. App. A). The petition for a writ of certiorari was filed on June 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the district court's denial of petitioners' motion to reveal the identity of an informant violated their Sixth Amendment right to confrontation.

2. Whether evidence seized when petitioners were arrested should have been suppressed.

3. Whether the evidence was sufficient to support the conviction of petitioners Dawna Robinson and Aubrey Robinson.

## STATEMENT

Following a bench trial in the United States District Court for the Southern District of Texas, petitioners were convicted of possessing approximately 154 pounds of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioners Willie Winkles and Aubrey Robinson were each sentenced to three years' imprisonment to be followed by four years' special parole. Petitioner Dawna Robinson was placed on four years' probation under the Youth Corrections Act. The court of appeals affirmed *per curiam* (Pet. App. B).

1. On September 11, 1974, Special Agent Murray of the Drug Enforcement Administration ("D.E.A.") in McAllen, Texas, received a call from an informant who on more than fifteen occasions had provided reliable information on criminal matters (Tr. 7-9). The informant told Murray that he had received information that petitioner Aubrey Robinson and three other persons had gathered at the Palm View Motel in McAllen, Texas, in rooms 209 and 210, for the purpose of "exporting" a quantity of marihuana from Texas to Alabama. He also stated that they were driving a 1972 black over white Plymouth bearing Alabama license plates numbered IC 64529 and that they had access to another vehicle bearing Texas license plates numbered KKX 498 (Tr. 9). The informant told Murray that a fifth man had been staying at the motel but had departed on a commercial flight from an international airport (Tr. 11). In addition, the informant mentioned the names Blanco and Lionel Herrera, the latter



of whom was a suspected narcotics dealer (Tr. 10, 25). A subsequent check of the Texas license number described by the informant showed that the vehicle was owned by Blanco Herrera (Tr. 9-10, 25).

Within minutes after the telephone call Murray went to the motel and observed the black over white 1972 Plymouth bearing the plates described by the informant (Tr. 11). Murray verified that rooms 209 and 210 had been signed for by petitioner Aubrey Robinson (Tr. 18). He then returned to his office and enlisted surveillance assistance from Special Agent Powell (Tr. 11-12). Powell commenced surveillance and observed the Plymouth leave the motel occupied by four people (Tr. 12, 14, 27). He subsequently lost sight of the vehicle and radioed this fact to Murray (Tr. 12). Special Agent Moore overheard the radio conversation and offered assistance (Tr. 13).

2. At approximately 6:00 p.m., the D.E.A. office in San Antonio relayed information to Murray that Moore had seen the Plymouth (Tr. 14). Moore followed the Plymouth for approximately 10 miles (Tr. 33). Eventually the Plymouth stopped along the side of the highway (Tr. 33). Through binoculars Moore noticed that the two persons in the front seat were turned toward and talking to the passenger in the back seat who was looking out of the rear window in Moore's direction (Tr. 34). The Plymouth then took off at a high rate of speed, and Moore lost sight of it (Tr. 34-36). When Moore increased his speed to approximately 110 miles per hour the Plymouth came into his view (Tr. 36-37). At that point he observed four occupants in the vehicle (Tr. 17, 28, 37). The surveillance team of Moore and Murray was joined by special agents Dracoulis and Hester, who decided to stop the vehicle (Tr. 17, 27).

3. After the agents stopped the vehicle and removed the occupants, Dracoulis asked them for the keys to the trunk (Tr. 18, 43-44). Petitioner Willie Winkles, the

driver of the car (Tr. 43), told Dracoulis that someone had taken the keys while they were loading (Tr. 50-51). One of the agents then entered the trunk through the back seat. There, he discovered bricks of marihuana and burlap bags and a paper sack filled with marihuana (Tr. 47-48). Items of clothing belonging to each petitioner were also found in the trunk (Tr. 49-50). Willie Winkles suggested that the person who had stolen the keys left the marihuana in the trunk (Tr. 44-45).

All four occupants were arrested. Later more than $1,000 in cash was discovered on petitioner Aubrey Robinson (Tr. 51). Papers commonly used in rolling marihuana cigarettes were discovered in petitioner Dawna Robinson's purse. In petitioner Willie Winkles' purse marihuana sweepings, which she claimed to be tea, were discovered (Tr. 52, 54).

## ARGUMENT

1. Petitioners contend the trial court violated their Sixth Amendment right of confrontation by denying their motion for disclosure of the identity of the D.E.A.'s informant. They assert such disclosure was required by their claim that there was no probable cause to stop and search their vehicle. But in *McCray* v. *Illinois*, 386 U.S. 300, 312-313, this Court held that the identity of an informant need not be disclosed for purposes of determining whether there was probable cause for an arrest or search, if the arresting officers give credible evidence that the informant was known to be reliable and that they had made the arrest in good faith upon the information he supplied. The Court rejected the contention that any Sixth Amendment rights are at stake in such situations (386 U.S. at 313-314):

> The petitioner does not explain precisely how he thinks his Sixth Amendment right to confrontation and cross-examination was violated by Illinois'



recognition of the informer's privilege in this case. If the claim is that the State violated the Sixth Amendment by not producing the informer to testify against the petitioner, then we need no more than repeat the Court's answer to that claim a few weeks ago in *Cooper* v. *California*:

> "Petitioner also presents the contention here that he was unconstitutionally deprived of the right to confront a witness against him, because the State did not produce the informant to testify against him. This contention we consider absolutely devoid of merit." *Ante*, p. 58, at 62, n. 2.

On the other hand, the claim may be that the petitioner was deprived of his Sixth Amendment right to cross-examine the arresting officers themselves, because their refusal to reveal the informer's identity was upheld. But it would follow from this argument that no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself. We have never given the Sixth Amendment such a construction, and we decline to do so now.

Since the arresting officers here established that the informant had supplied accurate information many times before and therefore was known to be reliable, and there is no question concerning the officer's good faith in making the arrest, petitioners' claim is foreclosed by this Court's decision in *McCray*.

2. Petitioners also contend that there was no probable cause for their arrests because the information acquired by the arresting officers after receiving the tip from the informant did not corroborate that petitioners had committed or were in the process of committing a

felony. That contention is simply factually inaccurate. Petitioners' attempt to escape the surveillance car by driving at an extremely high speed after they apparently had observed it confirmed the information that a crime had been or was in the process of being committed. The arresting officers' observation of petitioners' guilty flight satisfied the requirement, stated by this Court in *Whiteley* v. *Warden*, 401 U.S. 560, 567, that "the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or * * * were in the process of committing the felony." Since the arrests were lawful, the search of the car was also. *Chambers* v. *Maroney*, 399 U.S. 42.

3. Petitioners Aubrey Robinson and Dawna Robinson contend that the government's evidence was insufficient to support their convictions. Petitioners presented no defense. Viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), the government's evidence showed that both petitioners, as well as the driver of the vehicle, were in possession of the 154 pounds of marihuana found in the trunk. There was evidence that all three petitioners participated in loading the trunk (Tr. 50-51). The luggage of each petitioner was found locked in the trunk with the bags containing marihuana and the loose bricks of marihuana (Tr. 47-50). Moreover, cigarette papers of a kind commonly used to roll marihuana cigarettes were found in the purse of Dawna Robinson and more than $1,000 in cash was found on Aubrey Robinson (Tr. 51-52).[1]

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[1]This case is factually distinguishable from *United States* v. *Cantu*, 504 F. 2d 387 (C.A. 5), upon which petitioners rely. In *Cantu* the Fifth Circuit concluded that, on the facts there, nothing had connected the passengers in a car carrying marihuana with possession of the marihuana. Here the convictions of the Robinsons were supported by evidence other than their mere presence in the car.



## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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